U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 7836357

Date: JAN. 17, 2020

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner seeks to employ the Beneficiary as a computer systems analyst. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. Immigration and Nationality Act section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Texas Service Center denied the petition, concluding that the Petitioner did not establish that it was the successor-in-interest to the entity that filed the labor certification.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL).[1] *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national applies for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

[1] The priority date of a petition is the date the DOL accepted the labor certification for processing, which in this case is April 7, 2011. *See* 8 C.F.R. § 204.5(d).

II. SUCCESSOR-IN-INTEREST

The Director concluded that the Petitioner did not establish that it was the successor-in-interest to the entity that filed the labor certification. Here, the labor certification was filed by [redacted] The Petitioner asserts that it is the successor-in-interest to [redacted]

A valid successor-in-interest relationship exists if three conditions are satisfied. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986). First, the Petitioner must fully describe and document the transfer and assumption of the ownership of the predecessor by the successor. *Id.* Pursuant to an asset purchase agreement (APA) dated July 8, 2015, between [redacted] and the Petitioner, [redacted] sold certain assets to the Petitioner as detailed on Exhibit 1 to the APA. The Agreement specifically states that the Petitioner assumed [redacted]'s obligations for the current Form I-140. The Director stated in his decision that the APA does not indicate that the Petitioner "took over all assets, liabilities and responsibilities" of [redacted] The Director appears to have strictly interpreted *Matter of Dial Auto* to limit a successor-in-interest finding to cases where a petitioner shows that it assumed "all" of the original employer's rights, duties, obligations, and assets. However, *Matter of Dial Auto* does not stand for the proposition that a valid successor relationship may only be established through the assumption of "all" or a totality of a predecessor entity's rights, duties, and obligations. Instead, the generally accepted definition of a successor-in-interest is broader: *"*One who follows another in ownership or control of property. A successor in interest retains the same rights as the original owner, with no change in substance.*"* *Black's Law Dictionary* 1570 (9th ed. 2009) (defining "successor in interest").

A mere transfer of assets, even one that takes up a predecessor's business activities, does not necessarily create a successor-in-interest. *See Holland v. Williams Mountain Coal Co.*, 496 F.3d 670, 672 (D.C. Cir. 2007). The purchase of assets from a predecessor will only result in a successor-in-interest relationship if the parties agree to the transfer and assumption of the essential rights and obligations of the predecessor necessary to carry on the business.[2] *See generally* 19 Am. Jur. 2d *Corporations* § 2170 (2010). Thus, as noted above, the Petitioner was not required to purchase all of [redacted]'s assets, liabilities, and responsibilities in order to establish a valid successor-in-interest relationship. Instead, the transfer must have included the *bona fide* acquisition of the essential rights and obligations of the predecessor necessary to carry on the business.

In the RFE, to establish the *bona fides* of acquisition, the Director specifically requested evidence that the full purchase price had been paid by the Petitioner for the assets listed in the APA. As noted by the Director in his decision, the Petitioner did not submit evidence of the exchange of compensation in its RFE response. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). On appeal, the Petitioner's counsel asserts that the Petitioner made payments under the APA totaling $50,000 from its checking account with [redacted] However, counsel did not support this assertion with any supporting evidence. Assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA

[2] The mere assumption of immigration obligations, or the transfer of immigration benefits derived from approved or pending immigration petitions or applications, will not give rise to a successor-in-interest relationship unless the transfer results from the *bona fide* acquisition of the essential rights and obligations of the predecessor necessary to carry on the business. *See* 19 Am. Jur. 2d *Corporations* § 2170; *see also* 20 C.F.R. § 656.12(a).

1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)).[3]

Further, [redacted] was administratively dissolved in the state of Kentucky in September 2015. The Director stated that as a result of the dissolution, the record does not establish that the Petitioner took over all assets, liabilities, and responsibilities of [redacted] We agree. The APA states that the Petitioner was required to pay [redacted] $25,000 at closing in July 2015, and $25,000 on or prior to December 31, 2015. The record does not establish that the full purchase price was paid prior to dissolution of [redacted] in September 2015. As previously noted, the record does not contain evidence of the exchange of compensation pursuant to the terms of the APA. Thus, it is not clear that the terms of the APA were fully satisfied.

The Director also determined that the APA was not properly signed by an authorized agent of [redacted] The APA was signed on behalf of [redacted] by [redacted]. At that time, the sole member of [redacted] was [redacted] and the corporate records from Kentucky indicate that [redacted] was member-managed. The record does not contain any documents establishing the officers, directors, or authorized agents of [redacted]

On appeal, the Petitioner asserts that "while [redacted] was engaged as an independent contractor, the latter was also re-appointed to an officer position as is customary in such transactions such that [redacted] was able to execute documents on the organization's behalf." It submits an email from its corporate counsel stating that after the sale of her equity interest in [redacted] in 2012, [redacted] "was appointed as the operating officer for [redacted] and she continued in this capacity until the dissolution of the company in 2015." However, counsel's assertions are not supported by the evidence in the record. Pursuant to Exhibit A of a stock purchase agreement dated May 1, 2012, [redacted] resigned as a director, officer and member of [redacted] There are no company documents in the record establishing that [redacted] was reappointed to an officer position at any time thereafter. An independent contractor agreement dated April 30, 2012, between [redacted] and [redacted] states that she resigned as an operating officer of [redacted] and that she shall "not have any supervisory or employee management role with the company." Therefore, the record does not establish that the APA was properly signed by an authorized agent of [redacted] For the reasons discussed above, the record does not fully describe and document the transfer and assumption of the ownership of [redacted] by the Petitioner, and the first prong of a valid successor-in-interest relationship has not been met.

Second, the job opportunity offered by the successor must be the same as the job opportunity originally offered on the labor certification. *Id.* at 482. The Petitioner has established the second prong of a valid successor-in-interest relationship.

Third, the successor must establish eligibility for the immigrant visa in all respects. The successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the successor must establish its ability to pay the proffered wage from the date of transfer of ownership forward. *See* 8 C.F.R. § 204.5(g)(2); *see also Matter of Dial Auto*, 19 I&N Dec. at 482. Here, the Petitioner has not established [redacted] s ability to pay

[3] The Petitioner asserts on appeal that it assumed a $610,331.02 tax levy as part of the asset transfer. However, the APA does not list the tax levy as a liability that was transferred. The APA specifically states that "the transfer of the assets pursuant to this Agreement shall not include the assumption of any liability of the Seller other than as specifically noted in this Agreement."

the proffered wage as of the priority date until the purported date of transfer of ownership on July 8, 2015. The proffered wage is $85,000 per year, and the priority date is April 7, 2011.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage.

In determining a petitioner's ability to pay, we first examine whether it paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not pay a beneficiary the full proffered wage, we next examine whether it had sufficient annual amounts of net income or net current assets to pay the difference between the proffered wage and the wages paid, if any. If a petitioner's net income or net current assets are insufficient, we may also consider other evidence of its ability to pay the proffered wage.[4]

In this case, the Petitioner submitted no regulatory-prescribed evidence of [redacted]'s ability to pay the proffered wage for 2011, 2012, 2013, 2014, and from January 1, 2015, to July 8, 2015. *See* 8 C.F.R. § 204.5(g)(2). Absent such evidence, we cannot find that [redacted] had the ability to pay the proffered wage in these years.

The Petitioner provided a letter from its vice president of operations stating that it has more than 100 employees and the ability to pay the proffered wage. However, the letter was written on behalf of the Petitioner and not [redacted] Therefore, the letter does not serve as evidence of [redacted]'s ability to pay the proffered wage. The record does not establish [redacted]'s continuing ability to pay the proffered wage from the petition's priority date until the date of the purported transfer of assets to the Petitioner.[5] Thus, the third prong of a valid successor-in-interest relationship has not been met, and the Petitioner has not established a valid successor-in-interest relationship with [redacted]

ORDER: The appeal is dismissed.

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[4] Federal courts have upheld our method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *Estrada-Hernandez v. Holder*, -- F. Supp. 3d --, 2015 WL 3634497, *5 (S.D. Cal. 2015); *Rizvi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x 292, 294-295 (5th Cir. 2015).

[5] The record establishes the Petitioner's ability to pay the proffered wage from 2015 to 2017. If the Petitioner pursues this matter further, it must also establish its ability to pay from 2018 onward.